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No. 95-1848

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

ADRIENNE DOWLING,

Petitioner,

vs.

ATLANTA CITY SCHOOL DISTRICT, JOSEPH G. MARTIN, JR., President, PRESTON W. WILLIAMS, Vice President, MIDGE SWEET, D.F. GLOVER, JOHN F. ELGER, ROBERT WAYMER, MARY ANNE BELLINGER, INA EVANS, and CAROLYN YANCEY, Members, In Their Personal and Official Capacity, LESTER W. BUTTS, Superintendent, In His Personal and Official Capacity, and MYRTICE TAYLOR, Associate Superintendent for Instruction, In Her Personal and Official Capacities,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

A. Statement of Facts And Procedural History

Petitioner, Adrienne Dowling, was initially employed by the Atlanta Board of Education in 1986 as General Manager for its public broadcasting stations, WABE Radio and WPBA Television. The Atlanta Board of Education operates these stations as licensee, providing telecommunications assistance in the education of students in the Atlanta Public Schools and the general public in the Atlanta metropolitan area.

As problems with Petitioner's job performance became apparent, Respondents questioned the viability of Petitioner's continued employment in the Atlanta Public Schools. In the fall of 1991, Dr. Myrtice M. Taylor, Associate Superintendent for Instruction in the Atlanta Public Schools and Petitioner's immediate supervisor, conducted a series of meetings with Petitioner to discuss her job deficiencies. These meetings were initiated by Dr. Taylor's issuance of a written notification of deficiencies to Petitioner, including a notice that the continuation of Petitioner's deficiencies would likely result in a recommendation that her employment be terminated.[1] The Superintendent also issued a notification that Petitioner needed to make specific improvements to permit continuation of her employment. In her meetings with Dr. Taylor,

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[1] R-113, 123; Exhibit E, p. 2.

Petitioner was given the opportunity to correct any misimpressions and to respond prior to the April 15th deadline imposed by Georgia law.[2] Petitioner's responses to Dr. Taylor were deemed unsatisfactory and, accordingly, Dr. Taylor recommended to Dr. Lester W. Butts, Superintendent of Schools, that Petitioner's contract of employment not be renewed for the 1992-1993 school year.

By correspondence dated April 13, 1992, Superintendent Butts notified Petitioner that he would not recommend renewal of her contract to the Atlanta Board of Education. Petitioner appealed the Superintendent's decision and, on or about June 16, 1992, the Atlanta Board of Education referred the matter for hearing to the Professional Practices Commission of Georgia ("PPC") pursuant to the Fair Dismissal Act.[3]

The School District continued to pay Petitioner's salary through July 15, 1992, the date that the PPC scheduled the matter for a hearing before a tribunal of educators. This hearing was continued by the PPC when Petitioner's counsel refused to stipulate that the attorney provided by the PPC to rule on issues of law was "disinterested" because that attorney represented boards of

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[2] O.C.G.A. § 20-2-211(b) requires public school systems to give employees notice of an intention not to renew their contracts of employment by April 15th or else such contracts are deemed renewed by operation of law.

[3] The Georgia Fair Dismissal Act is O.C.G.A. § 20-2-940, et seq.

education other than the Atlanta Board of Education.[4] The hearing was then rescheduled and, even when Petitioner filed her lawsuit in this case, a hearing had been scheduled before the Professional Practices Commission for September 15, 1992.[5]

On August 19, 1992, Petitioner filed the instant action in the Superior Court of Fulton County, Georgia claiming that Respondents had violated the Fair Dismissal Act in failing to hold a hearing prior to terminating her employment[6] and that she was therefore entitled to reinstatement, back pay, punitive damages, and other relief. In addition to her Fair Dismissal Act claims, Petitioner generally alleged that she had been deprived of property without due process of law. On August 20, 1992, a presiding Superior Court judge entered a temporary restraining

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[4] R1-220, R-147.

There were two "records" of this case transmitted to the Supreme Court of Georgia at separate stages. The record in case no. S93A1330 will be designated with a citation to "R1"; citations to the record before the court in case no. S95C1083 (the final decision) are cited as "R".

[5] R1-42; see also *Affidavit of Adrienne Dowling* filed in support of her motion for TRO, at ¶12 ("The Schools have rescheduled the hearing for September 15, 1992.")

[6] The Fair Dismissal Act provides for a full evidentiary hearing, complete with the power to subpoena witnesses, prior to the termination of a tenured teacher. O.C.G.A. § 20-2-940. Both the State Board of Education (R-207-234) and the Superior Court judge to whom the case was assigned (R-235-38) determined that Petitioner was not covered by the Fair Dismissal Act but that Petitioner's property interest in continued employment arose from a contract which incorporated the terms of the Fair Dismissal Act. See Appendix to Petition for Certiorari at A14-17.

order in Petitioner's favor, enjoining Respondents from discontinuing Petitioner's salary until she was provided with a full administrative hearing under the Fair Dismissal Act. Respondents fully complied with that order and Petitioner received her full salary until after the hearing held by the Professional Practices Commission on October 4, 5, and 8, 1992 and the publication of its report on October 27, 1992.

On November 9, 1992, the Atlanta Board of Education voted to uphold the Superintendent's recommendation that Petitioner's contract not be renewed and to dismiss Petitioner from the Board's employ. The Board took this action based upon particular findings contained in the PPC's report regarding serious performance failures and inadequacies on the part of Petitioner. Petitioner then appealed the Board's action to the State Board of Education pursuant to O.C.G.A. § 20-2-1160. On July 8, 1993, the State Board of Education reversed the Atlanta Board of Education's decision not to renew Petitioner's contract of employment. Following that decision, the Superior Court first granted Petitioner summary judgment on her claim under the Fair Dismissal Act and then entered an order directing that Petitioner be reinstated and that all back pay and other benefits be paid to her by the Atlanta Board of Education. Respondents fully complied with that order and there is no issue in this case with respect to the fact that Petitioner has received all back pay and benefits to which she might be entitled.[7]

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[7] See Appendix to Petition for Certiorari, at A12-13.

Following Petitioner's reinstatement, the case was called for jury trial on March 31, 1994, on the issue of Petitioner's claim under 42 U.S.C. § 1983. At the call of the case, counsel for Respondents moved that the claim be dismissed and, on April 1, 1994, the trial court dismissed the remaining claims.[8] The trial court subsequently awarded Petitioner attorneys' fees of approximately $28,000.00.

B. Petitioner Failed To Raise Or Preserve For Review Any Issue Regarding Substantive Due Process Rights Which She Now Seeks To Have Reviewed

In the third of her Questions Presented, Petitioner asserts that this Court should grant certiorari to review whether she was deprived of substantive due process rights. Although Petitioner asserts that she presented this issue to the Supreme Court of Georgia, she fails to provide any citation to the record in support of this claim and Respondents' review of the briefs to the Georgia Court – which heard the case on Respondents' Petition for Certiorari – fails to reveal any claim by Petitioner that she was deprived of substantive due process rights in this case.[9] Even Petitioner's complaint only raises the issue of

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[8] *Id.*

[9] Dowling's brief in response and opposition to the Board's Petition for Certiorari filed in the Georgia Supreme Court states:

> The Petition has cited a number of federal cases for the proposition that Dowling cannot recover damages under § 1983 for a violation of substantive due process. The Court of Appeals, however, did not address a violation of substantive due process.

due process under the 14th Amendment in the context of her alleged dismissal without a hearing. (R-1). Not even the vaguest reference is made in the complaint to the argument stated in this Petition – that Respondents' termination of Petitioner's employment violated a "fundamental right" because another hearing body determined that the Board of Education had inadequate grounds to effect a termination.

C. Petitioner Has Made Significant Misstatements Of The Facts

Throughout her Petition, Adrienne Dowling has represented to this Court that Respondents terminated her employment without any pre-deprivation hearing whatsoever. This representation is patently false. As found by the trial court and as further demonstrated by the full record in the case, Petitioner was afforded several hearings prior to the Superintendent's notification that he would not recommend renewal of her contract for the 1992-1993 school year.[10] Petitioner was also given the

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> Rather, it allowed Dowling to seek damages for a violation of procedural due process, as required by clear and binding authority of the United States Supreme Court.

Response of Adrienne Dowling In Opposition To Petition for Writ of Certiorari, p. 11. If Petitioner intended this statement to be a timely and proper invocation of a claim that she was denied substantive due process, the effort failed. The question was simply not raised or, if raised, was not preserved for review by this Court.

[10] In its Temporary Restraining Order dated August 20, 1992, the trial court held: "Although several hearings were held

opportunity to have a full evidentiary hearing before a neutral tribunal of educators before suffering any termination of pay or benefits.[11]

In addition, Petitioner repeatedly refers to the time period during which she was allegedly deprived of property without due process as being 18 months.[12] In fact, however, a full evidentiary hearing was scheduled regarding Petitioner's appeal on July 15, 1992 before the Georgia Professional Practices Commission and was continued only because of Petitioner's objection to the attorney appointed by the PPC to rule on issues of law.[13],[14] As

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in October, 1991, on certain charges against Dowling, these hearings were insufficient to comply with the Fair Dismissal Act." See also *supra* where details of the Respondents' meetings with Petitioner are described and the record citations are made.

[11] R1-220, R-147.

[12] See, for instance, the Questions Presented, nos. 1 and 2; Petition, p. 7.

[13] Petitioner acknowledges the truth of this statement, but attributes the "fault" for the failure of the hearing to go forward to Respondents. Petition for Certiorari, p. 4 at fn. 2. While Petitioner was authorized to present objections regarding the attorney appointed by the PPC as well as notice issues under the Fair Dismissal Act, there is no support for Petitioner's assertion that the hearing was "constitutionally inadequate."

[14] The statement of facts as presented by Petitioner obliquely raises the question of why the Professional Practices Commission would have scheduled the first hearing opportunity for Petitioner after the expiration of her current contract. The answer to this question does not appear anywhere in the record of this case, but it may be helpful to the Court to know that hearings under the Fair Dismissal Act are frequently scheduled during the summer months in "non-renewal" cases. The teachers who are the subject of such hearings continue to

of August 20, 1992, Respondents resumed Petitioner's salary pursuant to the trial court's entry of a temporary restraining order, a fact also acknowledged by Petitioner. Moreover, Petitioner had a full hearing on October 4, 5, and 8, 1992 and has never challenged the adequacy – either under the Fair Dismissal Act or under the 14th Amendment – of that hearing. Thus, Petitioner's references to an 18 month-long deprivation of property without due process are simply unfounded.[15] Petitioner was out of her office without pay only from the time of the scheduled hearing on July 15, 1992 until the entry of a temporary restraining order on August 20, 1992.[16]

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receive their annualized salary during the summer months when their teaching obligations under the contracts at issue have ended, so the summer scheduling does not require the teacher to miss either work or pay in the usual case. In this case, however, Petitioner was a year-round employee and was thus instructed to leave her office for the short period between the end of her contract and the first scheduled hearing date, although her pay was continued until such date.

[15] To the extent that Petitioner might be asserting that she was deprived of a constitutionally protected property interest until she was reinstated in her position as general manager, Petitioner's argument fails because she had no property interest in actually holding the office or performing the duties of that job under Georgia law. *Rodgers v. Georgia Tech Athletic Association*, 166 Ga. App. 156, 303 S.E.2d 467 (1983); see also *Kinsey v. Salado Independent School Dist.*, 950 F.2d 988 (5th Cir. 1992); *Royster v. Board of Trustees of Anderson County School Dist.*, 774 F.2d 618 (4th Cir. 1985).

[16] There is no issue regarding the fact that Respondents continued to pay Petitioner from the expiration of her contract on June 30, 1992 through the date of the first scheduled hearing before the Professional Practices Commission on July 15, 1992. See Petition for Certiorari, p. 4.

Finally, it should be noted that Respondents do not agree with Petitioner's statement, on page 7 of the Petition, that the "facts underlying the later violations of due process are uncontested. . . . " Respondents do not agree that there were any "later violations of due process." This Petition raises for consideration only a question of alleged deprivation of pre-termination procedural due process. No other alleged violations of due process were raised in Petitioner's complaint or preserved for review by this Court.[17] As Petitioner has not stated exactly what "facts" she contends are uncontested, and as she has misstated such important specific facts, Respondents can not leave unopposed any impression that they agree with whatever additional facts Petitioner might deem uncontested.

REASONS WHY THE PETITION SHOULD BE DENIED

A. Introduction

In this section, Respondents will discuss the many reasons why the Petition should be denied and will demonstrate that this case is a poor vehicle for the Court's review of the questions presented by Petitioner. First, the

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[17] Petitioner has sought review of a claim that she was deprived of substantive due process, but that issue also was neither raised below nor otherwise preserved for review by this Court. See *supra*. Additionally, the parties' dispute regarding appellate procedure under the Fair Dismissal Act, litigated in the Georgia appellate courts, does not constitute a constitutional due process claim.

facts of the instant case do not present the issues Petitioner raises. Respondents will next show that the decision of the Supreme Court of Georgia does not directly contradict a prior decision of this Court as asserted by Petitioner. In addition, the cases cited by Petitioner fail to support the claim that there exists a significant conflict among lower courts on the issues raised. Finally, Petitioner has failed to demonstrate that the issues in this case require any further resolution by this Court. In light of the Court's recent and repeated refusals to grant certiorari in cases with similar issues, Petitioner has failed to show why this case requires the review sought.

B. The Facts Of This Case Do Not Present The Issues Raised By Petitioner

Petitioner asserts that her version of disputed facts must be accepted by this Court because it arises from a motion to dismiss granted on a question of law. While Petitioner is correct in the assertion that a complaint dismissed for failure to state a claim will be reviewed considering all allegations of fact as true, this rule of law is inapplicable in the instant case. Unlike a complaint dismissed for failure to state a claim without any record having been established, this case was decided on mixed questions of law and fact (adequacy of state remedies)[18] more than 18 months after the complaint was filed and after the facts had been established in a number of hearings and in a motion for summary judgment.

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[18] Petition for Certiorari at A12-13.

In the instant case, an order of the trial court established that "several hearings were held in October, 1991, on certain charges against Dowling."[19] The record further establishes that Petitioner's supervisor held meetings with her to discuss these charges and that Petitioner had an opportunity to respond to her employer's allegations and concerns.[20] Finally, the record in this case establishes that Petitioner was afforded an opportunity for a full evidentiary hearing before the Professional Practices Commission before Respondents discontinued payment of her salary.[21] These procedural facts authorized the trial court to make a determination as a matter of law that Petitioner had not been deprived of a protected property interest without due process of law.

Care must be taken to distinguish among the issues involved in the various court orders in this case on the question of pre-termination hearings. Until the trial court's dismissal of Petitioner's claims under 42 U.S.C. § 1983 on April 1, 1994, the issue being litigated and decided in every instance was whether Dowling was entitled to, and then whether she had been afforded, hearings which complied with the provisions of the Fair Dismissal Act, incorporated into her contract. The Fair Dismissal Act, however, requires far more extensive pre- and post-termination procedures than does the 14th Amendment. None of the tribunals which heard this case, including the trial court, the State Board of Education, the Georgia Court of Appeals and the Supreme Court of

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[19] Temporary Restraining Order dated August 20, 1992, ¶ f.

[20] R-113, 123, Exhibit E, p. 2.

[21] See Petition for Certiorari, p. 4 at fn. 2.

Georgia ever found that the pre-termination process afforded to Petitioner by Respondents was inadequate under the 14th Amendment to the Constitution and this Court's decision in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985).[22]

Since the facts in this case demonstrate that Petitioner received all of the pre-termination process that she was due under the 14th Amendment, the case fails to present the issues raised by Petitioner which are premised upon the incorrect assertion that Dowling was not afforded pre-termination due process. Similarly, it is not necessary that the Court determine whether the procedural and compensatory remedies afforded Petitioner were adequate to remedy a procedural deprivation as the case does not present the procedural due process violation urged by Petitioner.

However, as argued below, although the record in this case establishes that Petitioner *did* receive adequate pre- and post-termination hearings, this case was properly decided by the Georgia Supreme Court without an explicit finding to that effect because the undisputed facts of record show that the State of Georgia afforded Petitioner adequate procedures to remedy any technical procedural deprivation that may have occurred and that Petitioner, in fact, utilized those procedures and received full due process.

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[22] See fns. 1, 10, *supra*.

C. The Decision Of The Supreme Court Of Georgia Does Not Directly Contradict A Prior Decision Of This Court

Petitioner's central argument in this case is that the decision of the Georgia Supreme Court must be reversed because it directly contradicts this Court's holding in *Zinermon v. Burch*, 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990). Essentially, Petitioner argues that *Zinermon* will always authorize an action for damages under 42 U.S.C. § 1983 where a governmental agency fails to provide a pre-termination hearing, because actions of the agency can never be considered to be random or unauthorized. Thus, Petitioner asserts, the adequacy of any later state-provided procedures is not relevant and her claims under § 1983 were improperly dismissed in the instant case. The following arguments demonstrate the fallacy of Petitioner's assertion.

The Georgia court did not base any part of its decision upon a finding that Respondents' actions were random or unauthorized. In fact, the lower court did not engage in any discussion at all of the so-called "*Parratt/Hudson* exception"[23] but instead based its decision upon a rule firmly embraced by this Court in *Zinermon* – that a deprivation without due process does not become an

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[23] In *Parratt v. Taylor*, 451 U.S. 527 (1981) and its progeny this Court established that where pre-deprivation due process is impossible because the deprivation results from a random or unauthorized act of a state actor whose conduct the State could not anticipate, adequate post-deprivation remedies are all that may be required by the Constitution.

actionable violation of due process unless and until the State fails to provide adequate remedies.[24]

In *Zinermon*, the plaintiff, while medicated and disoriented, signed forms requesting admission to, and treatment at, a Florida mental hospital, in apparent compliance with state statutory requirements for "voluntary" admission to such facilities. After his release, plaintiff brought suit under 42 U.S.C. § 1983 on the ground that defendants had deprived him of his liberty without due process of law. Plaintiff's complaint in that action alleged that state officials had violated state law by admitting him as a voluntary patient when they knew or should have known that he was incompetent to give informed consent to his admission, and that their failure to initiate Florida's involuntary placement procedure denied him constitutionally guaranteed procedural safeguards. The Court found that the State of Florida had "broadly delegated, uncircumscribed power to effect the deprivation at issue,"[25] and concluded that the plaintiff's allegations were sufficient to state a § 1983 claim based on the State's failure under Florida law to provide adequate pre-deprivation procedures to prevent the loss of which the plaintiff was complaining. The Court in *Zinermon* did not, however, hold that when a government agency itself fails

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[24] Petition for Certiorari at A3, citing *Zinermon v. Burch*, 494 U.S. 111, 110 S.Ct. 975, 983, 108 L.Ed.2d 100 (1990) and *McKinney v. Pate*, 20 F.3d 1550, 1557 (11th Cir. 1994), cert. denied, ___ U.S. ___, 115 S.Ct. 898, 130 L.Ed.2d 783 (1994).

[25] *Zinermon, supra*, 494 U.S. at 136, 110 S.Ct. at 989. Specifically, the hospital staff in Florida had "broad power and little guidance", *id.*, to determine when the involuntary commitment procedures should be invoked and a hearing held.

to hold a hearing required by due process, a claim for damages under 42 U.S.C. § 1983 will automatically become cognizable.

In contrast to the underlying law in *Zinermon*, Georgia law at issue in this case requires procedures which provide no discretion to the governmental agency charged with providing due process. The Fair Dismissal Act gives the teachers to whom it applies an absolute right to a full hearing upon request and full rights of appeal. O.C.G.A. §§ 20-2-940, et seq; 20-2-1160. These procedures have been held to be constitutionally adequate. See, e.g., *Holley v. Seminole County School District*, 755 F.2d 1492 (11th Cir. 1985). In the instant case, despite the fact that Petitioner was not a teacher to whom the Fair Dismissal Act applied by statutory mandate, the trial court determined that Dowling was entitled to the procedures required by the statute because her contract incorporated the Act's procedural provisions.[26]

Furthermore, beyond the procedures required by the State of Georgia in the Fair Dismissal Act, Georgia affords, and afforded to Petitioner, full access to the courts when a local board of education fails to provide a hearing required by law. *Board of Education of Richmond County v. Young*, 187 Ga. 644, 1 S.E.2d 739 (1939).

These elaborate, nondiscretionary, State-provided procedures which were both available to and utilized by Petitioner are unlike any of the statutes and procedures at issue in *Zinermon* and markedly distinguish this case

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[26] Petition for Certiorari, at A16-17.

from that decision. The *Zinermon* decision was determined by the absence of adequate state procedures and remedies, not simply the identity of the governmental actor. In stark contrast to the procedures at issue in *Zinermon*, Georgia provided adequate state procedures and remedies to Petitioner to remedy any procedural deprivation she suffered. Accordingly, the decision of the Supreme Court of Georgia does not directly contradict a prior decision of this Court.

D. The Cases Cited By Petitioner Fail To Demonstrate A Significant Conflict Among State Courts Of Last Resort Or Federal Courts Of Appeal

While Respondents do not agree with Petitioner's argument that this case is controlled by *Zinermon*, there is no dispute that, if the merits of this case were to be reviewed by this Court, resolution of the issues presented would require an analysis of the facts in light of this Court's decisions in *Parratt v. Taylor*, 451 U.S. 527 (1981), *Hudson v. Palmer*, 468 U.S. 517 (1984), and *Zinermon v. Burch*, 494 U.S. 113 (1990) because, in essence, Petitioner claims that this case should be controlled by the *Zinermon* decision and that the Georgia Supreme Court's decision is contrary to the law established in that case.

Respondents concede that friction may exist among the Court's decisions in *Parratt*, *Hudson* and *Zinermon*, as well as the decisions of the state and lower federal courts attempting to apply them,[27] but any lack of complete

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[27] See, e.g., Alexander, "Constitutional Torts, the Supreme Court, and the Law of Noncontradiction: An Essay on Zinermon

harmony does not amount to a conflict so widespread or significant that the issue demands resolution by the Court. In fact, almost all of the cases cited by Petitioner to demonstrate the existence of a conflict fail to even present a disagreement with the decision reached by the Supreme Court of Georgia.

For instance, although Petitioner cites a number of cases as being in "conflict" with the case at bar, a proper reading of the following decisions relied upon by Petitioner shows that they actually support the result reached by the Georgia court: *Irby v. Macht*, 522 N.W.2d 9 (Wis. 1994) (holding that prison officials acted in a random and unauthorized manner when they violated state law as to which they had no discretion and the existence of adequate state remedies barred a § 1983 action as to this conduct); *Cooperman v. University Surgical Associates, Inc.*, 513 N.E.2d 288 (Ohio 1987) (holding that complaint failed to state a claim for relief under § 1983 because of the existence of adequate post-deprivation state remedies); *Wilhelm v. Gray*, 766 P.2d 1357 (Okl. 1988) (affirming dismissal of plaintiff's complaint because Oklahoma law provided adequate and meaningful remedies for the alleged deprivation of liberty).

Other cases cited by Petitioner to evidence the existence of a conflict requiring resolution by this Court do not demonstrate a conflict at all because the cases do not involve a question of procedural due process and thus are

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v. Burch," 87 Nw.U.L. Rev. 576 (1993) and Juarez, "The Supreme Court as the Cheshire Cat: Escaping the Section 1983 Wonderland," 25 St. Mary's L.J. 1 (1993).

not applicable, *Brosterhous v. State Bar of California*, 906 P.2d 1242 (Cal. 1995) (although the case did not involve a claimed deprivation of property or liberty without procedural due process, the court noted, at fn. 6, that such a claim would be barred by the existence of adequate state remedies); *Mosher v. City of Lakewood*, 807 P.2d 1235 (Colo. App. 1991) (plaintiff alleged unwarranted arrest and beating by officers which are substantive, not procedural, violations), or because the courts at issue reached their decisions on other grounds not at issue here, *Owens v. City of Phoenix*, 884 P.2d 1100 (Ariz. App. 1994) (cause of action stated under § 1983 for city's failure to enact and follow adequate procedures); *Kristensen v. Strinden*, 343 N.W.2d 67 (N.D. 1983) (state courts of North Dakota have subject matter jurisdiction over § 1983 claims); *Sutton v. Cleveland Board of Education*, 958 F.2d 1339 (6th Cir. 1992) (dismissal of due process claim reversed because state remedies were inadequate).

Although Respondents have not undertaken to discuss the cases cited by Petitioner as being consistent with the decision below, it bears noting that Petitioner omitted from her list of consistent cases the primary authority relied upon by the Georgia court, *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994), cert. denied, ___ U.S. ___, 115 S.Ct. 898, 130 L.Ed.2d 783 (1994), the recent previous decision by the Georgia Supreme Court in *Turner v. Giles*, 264 Ga. 812, 450 S.E.2d 421 (1994), cert. denied, ___ U.S. ___, 115 S.Ct. 1959, 131 L.Ed.2d 851 (1995), and decisions from other circuits not mentioned, including the Second, *Young v. Hoffman*, 970 F.2d 1154 (2nd Cir. 1992); Third, *McDaniels v. Flick*, 59 F.3d 446 (3rd Cir. 1995), cert. denied, ___ U.S. ___, 116 S.Ct. 1017, 134 L.Ed.2d 97 (1996); Fourth,

Fields v. Durham, 909 F.2d 94 (4th Cir. 1990); Fifth, *Charbonnet v. Lee*, 951 F.2d 638 (1992); and Ninth, *Raditch v. United States*, 929 F.2d 478 (9th Cir. 1990).

Only two of the cases cited by Petitioner, *Moore v. Warwick Public School District No. 29*, 794 F.2d 322 (8th Cir. 1986) and *Kellog v. City of Gary*, 562 N.E.2d 685 (Ind. 1990) appear to be irreconcilable with the result reached by the Supreme Court of Georgia and not distinguishable on other grounds. However, as discussed below, the existence of this discord has not proven worthy of further consideration by this Court to date and Petitioner has failed to identify any compelling reasons why it should be addressed now.

E. Petitioner Has Failed To Demonstrate That The Issues In This Case Require Further Resolution By This Court

In a number of recent cases, including *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994), cert. denied, ___ U.S. ___, 115 S.Ct. 898, 130 L.Ed.2d 783 (1994) and *Turner v. Giles*, 264 Ga. 812, 450 S.E.2d 421 (1994), cert. denied, ___ U.S. ___, 115 S.Ct. 1959, 131 L.Ed.2d 851 (1995), this Court has been presented with an opportunity to review on certiorari the very questions raised by Petitioner here and has declined to do so. These two cases, relied upon by the Georgia Supreme Court in its decision below, are entirely consistent with the present case on the issues involved.

Most recently, in *McDaniels v. Flick*, 59 F.3d 446 (3rd Cir. 1995), cert. denied, ___ U.S. ___, 116 S.Ct. 1017, 134 L.Ed.2d 97 (1996), the Court declined to review another

decision from a circuit court of appeals which held that the adequacy of post-termination remedies provided by the state, including access to state courts, was a sufficient remedy for any alleged pre-termination procedural deprivation. In that case, a tenured college professor brought suit under § 1983 claiming that he was denied pre-termination procedural due process because the procedure afforded to him was a sham. Relying upon *McKinney v. Pate,* the district court in *McDaniels* held that the sufficiency of the post-termination protections afforded to the plaintiff rendered irrelevant any claim of a pre-termination deprivation. The Third Circuit, relying upon *Zinermon* and *McKinney,* held that the college was not required to provide McDaniels with a hearing before an impartial decisionmaker prior to a termination decision and that McDaniels was not deprived of procedural due process because the state provided him sufficient post-termination process to protect his property rights. *Id.*

Petitioner has failed even to argue that the instant case can be distinguished in any way from these cases which were found unworthy of plenary review, choosing instead to argue that the Court should hear this case because the State of Georgia consistently defies the law and violates the rights of its citizens.[28]

As shown above, this case is entirely consistent with established case law in the vast majority of states and

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[28] See, e.g., Petition for Certiorari at p. 18 where Petitioner cites *Turner v. Giles* as authority for the proposition that Georgia's "refusal to enforce the requirement of predeprivation due process is well-established."

federal judicial circuits. Because this Court has not previously found any compelling reason to revisit its decisions in *Parratt, Hudson,* and *Zinermon* under like circumstances, nor has it presently been given any such compelling reason in this case, Petitioner has failed to demonstrate that the issues in this case require further resolution by this Court.

F. The Case Was Correctly Decided By The Supreme Court Of Georgia

1. The decision below correctly applied the law in holding that Georgia procedural remedies, including access to the courts, cured any procedural deprivation suffered by Petitioner

In *Zinermon v. Burch*, 494 U.S. 113, 126, 110 S.Ct. 975, 983, 108 L.Ed.2d 100 (1990), this Court held that

> In procedural due process claims, the deprivation by state action of a constitutionally protected interest in "life, liberty, or property" is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law*. [Cits]. The constitutional violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process. Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate. This inquiry would examine the procedural safeguards built into the statutory or administrative procedure of effecting the deprivation, and any remedies for erroneous deprivations provided by statute or tort law.

Consistent with this holding, and the Court's previous decisions in *Parratt* and *Hudson*, the Eleventh Circuit Court of Appeals held in *McKinney v. Pate, supra*, that where an employee allegedly deprived of due process in an employment termination context is given access to the state courts under state law, and where the state courts have the power to provide the procedural relief to which the employee claims entitlement, a hearing by the governmental employer and compensation for any loss suffered as a result of the deprivation, such state procedures satisfy procedural due process and no constitutional violation actionable under § 1983 has occurred. *Id.* at 1563-4. As the *McKinney* court stated, "the state may cure a procedural deprivation by providing a later procedural remedy; only when the state refuses to provide a process sufficient to remedy the procedural deprivation does a constitutional violation actionable under section 1983 arise." *Id.* at 1557, citing *Zinermon*.

Subsequent to its decision in *McKinney v. Pate*, the Eleventh Circuit Court of Appeals addressed the adequacy of Georgia procedures and held in *Narey v. Dean*, 32 F.3d 1521 (11th Cir. 1994), that a Georgia procedure virtually identical to that utilized by Petitioner herein was constitutionally adequate and would bar a claim for damages under 42 U.S.C. § 1983 in federal court for a procedural due process violation:

> [I]t is "only the state's refusal to provide a means to correct any error . . . [that] would engender a procedural due process violation." *McKinney*, 20 F.3d at 1563. . . . [T]he post-deprivation remedies available under Georgia law are adequate; the State Personnel Board, and the

> state courts upon reviewing the Board's decision, have the power to grant reinstatement and to compensate employees for back wages and other lost benefits. See *Department of Corrections v. Colbert*, 202 Ga. App. 27, 413 S.E.2d 498, 500 (1991) (discussing procedure for presenting claim for back pay and other benefits); *Georgia Dept. Of Labor v. Sims*, 165 Ga. App. 856, 298 S.E.2d 562, 563 (1982) (awarding reinstatement and back pay to terminated employee).

Narey v. Dean, 32 F.3d at 1527. The court then held that since Georgia law clearly gave the state courts the power to grant reinstatement and to compensate terminated employees for back wages and other lost benefits, no violation of due process occurred.

Without question, state remedies – procedural, equitable, and compensatory – were available and were provided to Petitioner by the State of Georgia. The trial court effected the procedural remedy to which Petitioner claimed entitlement and she received both a full and complete hearing and a continuation of her salary until the hearing was held.[29] When the state administrative process failed to afford Petitioner the reinstatement and

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[29] Unlike the plaintiff in *Zinermon v. Burch* who suffered a completed violation of his rights before he was able to bring an action in state court because of his incapacity, Petitioner filed her state court suit shortly after her salary was discontinued and could have, under available state procedures, filed her suit on June 30, the same day as she was allegedly terminated without a prior hearing. Thus, Georgia provides a means by which Petitioner could have secured immediate judicial review and remedy and this case is, on that ground, wholly different from *Zinermon*.

additional pay she sought, again the state court provided these remedies. The state procedures available to and utilized by Petitioner were clearly adequate to secure all procedural due process to which Petitioner was entitled. The Supreme Court of Georgia thus correctly held that because the procedures and other remedies provided to Petitioner by state statutes and the state court were adequate to redress any procedural deprivation that Dowling suffered, Petitioner's § 1983 claim was properly dismissed.

2. The equitable and compensatory remedies provided by the State of Georgia are adequate to address the alleged deprivation

While acknowledging that the equitable and compensatory remedies she received – reinstatement with back pay and benefits – might be adequate "in some circumstances" (Petition for Certiorari at 17), Petitioner argues that she was not provided with adequate state remedies in this case. As shown below, these arguments do not merit review by this Court.

a. The remedies provided to Petitioner, while not identical to those available under 42 U.S.C. § 1983, were adequate

This Court has previously held that the remedies provided by the state need not be identical to those which might be available under § 1983 in order to be adequate and satisfy due process. *Parratt v. Taylor, supra,* 451 U.S. at 544, 101 S.Ct. at 1917. A state remedy will not be rejected unless it is "inadequate to the point that it is meaningless

or nonexistent." *Easter House v. Felder*, 910 F.2d 1387 (7th Cir. 1990), cert. denied, 111 S.Ct. 783 (1991); *Economic Dev. Corp. v. Stierheim*, 782 F.2d 952, 955 (11th Cir. 1986). As shown *supra*, the reinstatement with back pay, benefits and fees awarded to Petitioner were fully adequate remedies in this case.

Petitioner argues, however, that she was deprived of due process because she was not allowed to pursue claims, such as her claim for punitive damages, and because she was not reinstated during the pendency of this litigation in the state court,[30] relief which she would not have been afforded even if her claims under § 1983 were not dismissed. See, e.g., *City of Newport v. Fact Concerts*, 453 U.S. 247, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981) (punitive damages may not be awarded against governmental entity). Furthermore, at all times when Petitioner moved for, and the state court denied, reinstatement on an interlocutory basis, Petitioner's cause of action under 42 U.S.C. § 1983 was pending. Accordingly, Petitioner's arguments are wholly without merit and raise no issue for review by this Court.

b. Petitioner has misrepresented Georgia law on the issue of sovereign immunity

In a final attempt to show that Georgia does not provide adequate remedies for the deprivation claimed by Petitioner, Dowling asserts that the State would deny her a tort remedy through application of sovereign immunity. (Petition for Certiorari at 16, citing O.C.G.A.

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[30] Petition for Certiorari at 16-18.

§ 20-2-992[31] and *Truelove v. Wilson*, 159 Ga. App. 906, 285 S.E.2d 556 (1981). Petitioner has absolutely misrepresented Georgia law.

In *Truelove v. Wilson, supra*, the Georgia Court of Appeals reversed a trial court's denial of summary judgment to a local board of education, the school district, and individual employees whose negligence allegedly contributed to the wrongful death of the plaintiffs' daughter. The Court held that the defendants were entitled to sovereign immunity against the plaintiffs' claims specifically because the complaint raised only negligence claims, but restated the rule of law that acts committed by a government employee outside the scope of his or her authority or intentional, wilful or malicious acts "will remove the shield of sovereign immunity." *Truelove*, 159 Ga. App. at 908 (citing *Hennessy v. Webb*, 245 Ga. 329, 264 S.E.2d 878 (1980); *Holloway v. Dougherty County School System*, 157 Ga. App. 251, 277 S.E.2d 251 (1981)).

Of course, Petitioner has alleged that Respondents' conduct was intentional, wilful and malicious because there can be no cause of action for a negligent deprivation

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[31] The statute provides:

> Nothing in this article shall be construed as waiving any immunity or privilege now or hereafter enjoyed by the State Board of Education, by the board of control of any cooperative educational service agency, by any local board of education, by any member of any such board, or by any employee of the state board, school superintendent, principal, teacher, administrator, or other employee or as waiving any immunity or privilege of any state or other public body, board, agency, or political subdivision.

of property under 42 U.S.C. § 1983. *Daniels v. Williams*, 474 U.S. 327 (1986). Thus, contrary to Petitioner's representation, sovereign immunity would not bar a tort claim in Georgia for a tort committed with the degree of intent alleged by Petitioner.

CONCLUSION

Petitioner in this case was afforded all of the process she was due under the 14th Amendment in connection with Respondents' termination of her employment in June 1992. Even if, *arguendo*, Petitioner was not afforded a pre-termination hearing as she claims, she did not suffer a violation of her right to due process because the State of Georgia provided her with fully adequate procedures to remedy that alleged failure as well as compensation for the deprivation in the form of back pay, restoration of benefits, and attorneys' fees.

The decision of the Supreme Court of Georgia does not warrant review by this Court for any of the reasons asserted by Petitioner. Furthermore, to the extent that a lack of complete harmony exists among the state and federal courts in the application of this Court's prior decisions, the specific posture of this case makes it a poor vehicle for the Court's review of the issues raised by the Petitioner.

For all of the above-stated reasons, Respondents respectfully submit that the Petition for Certiorari should be denied.

Respectfully submitted,

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